Supreme Court, U.S.
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No. 02-567

IN THE

Supreme Court of the United States

DEE AND DON HOLLANDER,
Petitioners,

v.

SANDOZ PHARMACEUTICALS CORPORATION, a New Jersey corporation; SANDOZ LTD., a foreign corporation; and HCA HEALTH SERVICES OF OKLAHOMA, INC., an Oklahoma corporation, d/b/a PRESBYTERIAN HOSPITAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether any certworthy issue arises from the Tenth Circuit's application of this Court's unanimous decision in *Caterpillar v. Lewis,* 519 U.S. 61 (1996), to conclude that the existence of federal diversity jurisdiction at the time of judgment mooted alleged deficiencies in the removal process?

Whether any certworthy issue arises from the Tenth Circuit's determination that complete diversity existed between the remaining parties, under one of two alternative rationales, at the time the district court entered judgment?

STATEMENT PURSUANT TO RULE 29.6

Sandoz Pharmaceuticals Corporation (now known as Novartis Pharmaceuticals Corporation), Respondent-Defendant, is a Delaware Corporation based in New Jersey, and it is an indirect, wholly-owned subsidiary of former defendant Sandoz Ltd. (now known as Novartis AG). Novartis Pharmaceuticals Corporation's parent companies are:

(1) Novartis Finance Corporation, a New York corporation;

(2) Novartis Corporation, a New York corporation;

(3) Novartis Holding AG, a Swiss company; and

(4) Novartis AG, a Swiss company, publicly traded on the New York Stock Exchange (symbol: NVS).

Direct subsidiaries not wholly-owned by the corporation:

(1) Ciba Vision Corporation; and

(2) Novartis Biotech Partnership, Inc.

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OPINIONS BELOW

The petition invites certiorari review of the opinion of the United States Court of Appeals for the Tenth Circuit in *Hollander v. Sandoz Pharmaceuticals Corp.*, reported at 289 F.3d 1193 (2002), and reproduced as Appendix A to the petition. The Tenth Circuit's order denying the Hollanders' request for rehearing and rehearing *en banc* is unreported, but reproduced as Appendix D to the petition.

STATEMENT OF THE CASE

Dee and Don Hollander, then citizens of Arkansas and Oklahoma, respectively, filed this products liability suit in Oklahoma state court. They named as defendants HCA Health Services of Oklahoma, Inc., d/b/a Presbyterian Hospital ("HCA"), an Oklahoma corporation, and Sandoz Pharmaceuticals Corporation ("Sandoz"), a Delaware corporation with its principal place of business in New Jersey.[1] The state court dismissed HCA, the sole non-diverse defendant. Pet. 58a. Sandoz then removed the case to the United States District Court for the Western District of Oklahoma, invoking the court's diversity jurisdiction under 28 U.S.C. § 1446(b).

The Hollanders filed a motion to remand, which the district court denied on the ground that the sole non-diverse defendant (HCA) was fraudulently joined. Explaining the basis for its decision to retain jurisdiction, the district court stated that controlling Oklahoma authority supported the state court's dismissal of HCA. Pet. 56a n.4. The district court reasoned that the doctrine of fraudulent joinder applies to permit removal where (as here) plaintiff states "a claim against an in-state defendant that simply has no chance of success." Pet. 56a n.3. The district court confirmed that the state court's dismissal of HCA was final under Oklahoma law, noting that the Hollanders' argument to the contrary "confused Okla. Stat. tit. 12, Ch. 2, App. Rule 13(E) with Okla. Stat. tit. 12, § 2012(B)(6)." Pet. 56a & n.2.

Following completion of extensive discovery, Sandoz sought summary judgment based on the failure of the Hollanders' proffered expert testimony to meet the standards

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[1] Sandoz Ltd., a foreign corporation, was also a named defendant and was subsequently dismissed. Petitioners do not raise any issue with respect to the dismissal of Sandoz Ltd.

of admissibility defined by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The district court held an evidentiary hearing on that motion, heard argument, and reviewed evidence presented by the parties. The district court ruled that the Hollanders' expert testimony on causation was inadmissible under *Daubert*, and accordingly granted summary judgment to Sandoz.

On appeal, the Hollanders challenged the district court's *Daubert* rulings and also challenged the district court's denial of their remand motion. The Hollanders urged the appellate panel to vacate the judgment in Sandoz's favor so that the case could be re-adjudicated in state court. The Tenth Circuit unanimously affirmed the district court. The Tenth Circuit found that the district court had fairly exercised its discretion in excluding the Hollanders' expert testimony pursuant to *Daubert*. Pet. 44a. The Tenth Circuit properly declined to address arguments regarding alleged defects in the removal procedure, reasoning—under authority of this Court's unanimous decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996)—that the determinative inquiry was whether "federal jurisdictional requirements [were] met at the time judgment [was] entered." Pet. 20a (*citing Caterpillar*, 519 U.S. at 64).

In addressing the Hollanders' arguments about alleged defects in the removal process—the only arguments that remain at issue in the instant petition—the Tenth Circuit observed that "complete diversity existed between the remaining parties at the time that the federal district court entered judgment." *Id.* at 20a-21a. The panel's opinion noted that at the time the federal district court entered judgment, "the Hollanders resided in Arkansas [Don Hollander having moved to Arkansas] and the defendant Sandoz [the only remaining defendant] was a Delaware corporation with its principal place of business in New Jersey." *Id.* In its subsequent order denying the Hollanders' request for rehearing, the panel added that regardless whether

"Mr. Hollander resided in Oklahoma or Arkansas, the record establishes that, at the time that the district court entered judgment, complete diversity existed between the plaintiffs and the remaining defendant [Sandoz]." Pet. 61a.

REASONS FOR DENYING THE WRIT

I. THE TENTH CIRCUIT'S ORDER DENYING REHEARING MAKES CLEAR THAT THE JURISDICTIONAL DETERMINATION BELOW DOES NOT DEPEND ON DON HOLLANDER'S CHANGE OF RESIDENCE.

The petition focuses on the significance to a proper jurisdictional analysis of Mr. Hollander's move from Oklahoma to Arkansas during the pendency of this case. The Tenth Circuit's order denying rehearing demonstrates, however, that the Tenth Circuit's jurisdictional holding does not depend on Mr. Hollander's change of citizenship. As the Tenth Circuit explained, irrespective whether "Mr. Hollander resided in Oklahoma or Arkansas," complete diversity existed at the time that the district court entered judgment. Pet. 61a.

The petition completely ignores the significance of the panel's order denying rehearing. The alternative holding expressed in that order exposes the irrelevance of Mr. Hollander's citizenship to the Tenth's Circuit's jurisdictional analysis. Complete diversity would have existed from the inception of this case but for the fact that plaintiff Don Hollander, the primary plaintiff's ex-husband, was a resident of Oklahoma, as was HCA. Sandoz's removal of this action was triggered not by Mr. Hollander's change of residence, but by the state court's dismissal of the Hollanders' claims against Oklahoma-based HCA, the sole potentially non-diverse defendant.

The district court's rejection of the Hollanders' remand motion confirmed that HCA had been fraudulently joined as a defendant under Oklahoma law. Only an error by the courts

below in treating HCA as fraudulently joined even arguably brings the question of Mr. Hollander's state of residence into play. It is axiomatic that fraudulent joinder of a resident defendant does not defeat removal. *See Roe v. General Am. Life Ins. Co.*, 712 F.2d 450, 452 n.* (10th Cir. 1983) (joinder of resident defendant against whom no cause of action exists does not defeat removal). The fraudulent joinder rule applies because of the conclusion below—by the Oklahoma state court in the first instance—that no viable claim existed against HCA under Oklahoma law. *Id.* As the district court held below, and as the Hollanders do not challenge here, a fraudulently joined party need not join in the removal petition, and the fraudulent joinder rule is an exception to the general rule that an event involuntary from plaintiffs' perspective does not create removal jurisdiction. Pet. 56a (*citing Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71-72 (7th Cir. 1992)). The lower court's treatment of HCA as fraudulently joined under Oklahoma law presents no issue for certiorari review, and the petition (correctly) does not assert otherwise.[2]

The petition does seek review of questions concerning whether, under the rationale of this Court's decision in *Caterpillar* or otherwise, a court may under any

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[2] The Hollanders claimed below that the fraudulent joinder rule should not apply because the Oklahoma Supreme Court has not addressed explicitly whether a hospital can be held strictly liable under Oklahoma law for making prescription drugs available to patients. Given that no Oklahoma court has ever imposed a duty on anyone but the manufacturer to warn the prescribing physician about a risk allegedly associated with a prescription drug or medical product, as well as the fact that a majority of jurisdictions have declined to "extend products liability to hospitals in circumstances like those in the case at bar," Pet. 52a-54a n.22, the Hollanders' speculation about what the Oklahoma Supreme Court *might* rule in the future was correctly rejected below. In any event, the proper application of the fraudulent joinder doctrine in the context of state law issues of first impression does not warrant further review by this Court.

circumstances rely on information concerning the changed residency of a party during the pendency of a case for the purposes of assessing the existence of diversity jurisdiction. Those questions are not presented by the Tenth Circuit's decision or the record before the Court, because the Tenth Circuit's order denying rehearing makes plain that Mr. Hollander's change of residence was neither outcome determinative nor integral to the Tenth Circuit's ultimate determination that complete diversity existed at the time the district court entered judgment. Accordingly, this case provides no vehicle for this Court to consider the questions presented, and the petition should be denied.[3]

II. THE TENTH CIRCUIT'S DECISION CREATES NO CIRCUIT CONFLICT ON THE ISSUE WHETHER A CITIZENSHIP CHANGE DURING PENDENCY OF AN ACTION MAY CREATE DIVERSITY JURISDICTION.

Petitioners strain to manufacture a circuit conflict where none exists. As a threshold matter, the only alleged "conflict" rests on the jurisdictional implications of a citizenship change during the pendency of an action, but the Tenth Circuit's order denying the Hollanders' request for rehearing leaves no

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[3] Taking the analysis a step further, and assuming for sake of argument some error in the state court's dismissal of HCA, the Tenth Circuit still could have determined that diversity jurisdiction existed without relying on Mr. Hollander's change of citizenship. The Tenth Circuit had the undisputed power to cure any defect of federal jurisdiction by dismissing HCA from the suit as a dispensable party pursuant to Rule 21 of the Federal Rules of Civil Procedure. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 n.7 (1989) (appellate court may salvage jurisdiction by dismissing a dispensable non-diverse party pursuant to Fed. R. Civ. P. 21). Given that the jurisdictional determination below could have been supported on this additional ground, it is particularly untenable to suggest that the Tenth Circuit's jurisdictional determination poses a question of law warranting this Court's review.

doubt that the Tenth Circuit disavowed Mr. Hollander's move from Oklahoma to Arkansas during the lawsuit as the sole basis for its jurisdictional determination. Thus, resolution of the asserted "conflict" would be irrelevant to the outcome of the case before the Court, and certiorari is not warranted.

In any event, the Tenth Circuit's jurisdictional analysis below does not conflict with the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997)—the only case identified in the petition as allegedly creating a circuit conflict. The petition characterizes both the decision below and *Saadeh* as involving the broad question whether a citizenship change during the pendency of an action can ever cure the absence of diversity jurisdiction earlier in the case. This superficial characterization slides past substantial differences between the jurisdictional issues below and those in *Saadeh.*

The jurisdictional contexts faced by the court below and the D.C. Circuit in *Saadeh* were completely distinct. Unlike *Saadeh*, in the case at bar minimal diversity as required by Article III of the Constitution was never in doubt (that is, diversity of citizenship existed between two parties on opposite sides of the action regardless of any alleged deficiencies in the removal process). In *Saadeh,* by contrast, the issue was not whether post-filing events could satisfy the statutory requirement of complete diversity, but rather whether such events could rectify the absence of even minimal diversity at the time the case was filed in federal district court.[4]

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[4] Absent minimal diversity, an appellate court's power to dismiss a non-diverse party to cure a jurisdictional defect in complete diversity is a non-issue. Although the *Saadeh* court acknowledged its authority to dismiss a dispensable defendant to cure jurisdictional defects, that option

Further, although the instant case concerned whether defects in removal were mooted by the existence of complete diversity at the time of judgment, *Saadeh* did not involve removal issues at all. Indeed, the D.C. Circuit distinguished *Saadeh*—which was a case filed originally in federal district court—from "cases involving removal." 107 F.3d at 57. The D.C. Circuit noted that the policy considerations that drove this Court's decision in *Caterpillar* involved "concerns in the removal context [that were] insufficient to warrant departure [in Saadeh] from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed." *Id.*

Finally, *Saadeh* involved a "complex issue of statutory interpretation" concerning the scope of the complete diversity rule in cases involving aliens admitted to the United States for permanent residence, *id.* at 55, an issue neither confronted nor addressed by the court below. In sum, a comparison of the jurisdictional factors at issue in *Saadeh* with those faced by the Tenth Circuit below reveals no relevant parallel, and certainly no circuit split on proper jurisdictional analysis.

III. THE DECISION BELOW WAS CORRECT

The Tenth Circuit's conclusion that the existence of complete diversity between the remaining parties at the time of judgment cured any jurisdictional defect was a correct application of this Court's decision in *Caterpillar*. As the Tenth Circuit concluded, echoing the words of this Court in *Caterpillar*, "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost

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was not available to the D.C. Circuit in *Saadeh*, because there the non-diverse defendant was indispensable to the just resolution of the case.

on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Caterpillar*, 519 U.S. at 77.

The policy considerations discussed in *Caterpillar* are particularly compelling where, as here, re-adjudication in state court would not change the result. In addition to the Tenth Circuit's decision affirming the district court's conclusion that the Hollanders' proffered expert testimony failed to meet the standards of admissibility defined by *Daubert*, two other circuits have reached the same result on virtually identical claims and facts. *See Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, *petition for reh'g and reh'g en banc denied*, ___ F.3d ___ (11th Cir. Aug. 19, 2002); *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, *petition for reh'g and reh'g en banc denied* (8th Cir. July 13, 2001). Furthermore, given that Oklahoma courts have adopted the *Daubert* paradigm for assessing the admissibility of scientific expert evidence, state court re-adjudication would entail application of the same legal principles applied below. *See Cities Serv. Co. v. Gulf Oil Corp.*, 980 P.2d 116, 132 & n.68 (Okla. 1999) (*citing Daubert* in support of holding trial judge must act as "gatekeeper" of proffered scientific testimony); *Taylor v. State*, 889 P.2d 319, 329 (Okla. Crim. App. 1995) (adopting *Daubert* as "a uniform method of addressing the admissibility of expert testimony on all types of scientific evidence"). Under these circumstances, just as in *Caterpillar*, "'requiring dismissal after years of litigation . . . would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.'" *Caterpillar*, 519 U.S. at 76 (*quoting Newman-Green*, 490 U.S. at 836).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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